Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

REV. FR. PRISCO ENTINES,
ELEAZAR P. ANDOQUE and
OLYMPIA A. SAARENAS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EMETERIO G. ROA, III
201 South Irving Street
Arlington, Virginia 22204
(703) 486-3541
Counsel for Petitioners.

April 14, 1999

Washington, D.C. • THIEL PRESS • (202) 328-3286

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Primary Basic Pay Statute contained in §12(a) of *The Selective Training and Service Act of 1940* as amended, P.L. 76-783, ch. 720, 54 Stat. 885, applicable to the Filipino World War II veteran?

2. If so, is the government's continued position that it was never applicable to them a deliberate attempt to mislead the Filipino World War II veteran so that the applicable statute of limitations is tolled?

3. Is the "continuing claims" doctrine applicable?

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the three-judge panel of the United States Court of Appeals for the Federal Circuit is reported in the Federal Reporter as *Entines v. United States,* ___ F.3d ___ (Fed. Cir., January 14, 1999). No Petition for Rehearing was filed. Petitioners appealed an Order of the United States Court of Federal Claims in *Entines v. United States*, 39 Fed. Cl. 673 (1997). The presiding judge therein, Honorable Lawrence Margolis, heard Oral Arguments on defendant's Motion to Dismiss on October 1, 1997, and granted said motion on December 16, 1997.

JURISDICTION

The United States Court of Appeals for the Federal Circuit in this case entered judgment in a manner that sanctioned a lower court's departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Further, the decision involves an important question of federal law that has not been, but should be, settled by this Court. Jurisdiction of the Honorable Supreme Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the 5th Amendment to the United States Constitution, ch. 720, §§3(a) & 12(a), Selective Training and Service Act of 1940 as amended, 28 U.S.C., §1491(a)(1), 28 U.S.C. §2501, 38 U.S.C. §107(a) and 38 U.S.C. §1521 and §1541, the last two also reproduced in the appendix.

STATEMENT OF THE CASE

When America's entry into what would be known as the Second World War was imminent, then President Roosevelt called into the service of the United States Armed Forces the organized military of its Philippine territory with the issuance of the following military order:

> "Under and by virtue of the authority vested in me by the Constitution of the United States, by section 2(a)(12) of the Philippine Independence Act of March 24, 1934 (48 Stat. 457), and by the Ordinance appended to the Constitution of the Commonwealth of the Philippines, and as Commander-in-Chief of the Army and Navy of the United States, I hereby call and order into the service of the armed forces of the United States for the period of the existing emergency, and place under the command of a General Officer, United States Army, to be designated by the Secretary of war from time to time, all of the organized military forces of the Government of the Commonwealth of the Philippines; *Provided*, that all naval components thereof shall be placed under the command of the Commandant of the Sixteenth Naval District, United States Navy.
>
> This order shall take effect with relation to all units and personnel of the organized military forces of the government of the Commonwealth of the Philippines, from and after the dates and hours, respectively, indicated in orders to be issued from time to time by the General Officer, United States Army, designated by the Secretary of War." 3 C.F.R. 1307 (1941).

Petitioners are Filipino veterans who were inducted into the United States Armed Forces by the aforecited order and fought under American command during World War II and/or their survivors. Their complaint for military

backpay and veterans' benefits was filed on November 22, 1996 with the United States Court of Federal Claims, where jurisdiction for money claims against the United States is vested, to wit:

> "The United States Court of Federal claims shall have jurisdiction to render judgement upon any claim against the United States founded either upon regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered as express or implied contract with the United States." 28 U.S.C. §1491(a)(1).

They sought to represent all persons similarly situated and moved for class certification. The government filed a Motion to Dismiss dated April 30, 1997, asserting that these claims for miltary backpay accrued upon their discharge after the war, and that the same is true as well for any breach of contract claim based on military service. As for the Takings claim, the government alleged that it accrued in 1946 when the legislation denying benefits to Filipino World War II veterans was passed. Since the complaint was filed decades after the accrual of the claims, the government alleged that they were time-barred. Oral arguments were heard on October 1, 1997. The trial court granted the motion to dismiss in an order dated December 16, 1997, *Entines v. U.S.*, 39 Fed. Cl. 673 (1997).

The matter was appealed to the United States Court of Appeals for the Federal Circuit, and Oral Arguments were

heard on January 6, 1999 by Circuit Judges Newman, Lourie and Schall. In a decision penned by Judge Newman, the trial court's order granting dismissal was affirmed on January 14, 1999, *Entines v. U.S.*, ___ F.3d ___ (Fed. Cir. 1999).

Petitioners Prisco E. Entines, Eleazar P. Andoque, and Olympia A. Saarenas respectfully pray that a Writ of Certiorari issue to review the said Judgment of the three-judge panel of the United States Court of Appeals for the Federal Circuit.

ARGUMENT

I.

THE SELECTIVE TRAINING AND SERVICE ACT OF 1940 AS AMENDED WAS APPLICABLE TO THE FILIPINO MEMBERS OF THE UNITED STATES ARMED FORCES.

The primary basic pay statute for members of the United States Armed Forces during World War II was established as follows:

> "The monthly base pay of enlisted men of the Army and the Marine Corps shall be as follows: Enlisted men of the first grade, $126; enlisted men of the second grade, $84; enlisted men of the 3d grade, $72; enlisted men of the fourth grade, $60; enlisted men of the fifth grade, $54; enlisted men of the sixth grade, $36; enlisted men of the seventh grade, $30; except that the monthly base pay of enlisted men with less than four months' service during their first enlistment and of enlisted men of the seventh grade whose inefficiency and other unfitness has been determined under regulations prescribed by the Secretary of War, and the Secretary of the Navy, respectively, shall be $21. The pay for specialists'

rating, which shall be in addition to monthly base pay, shall be as follows: First class, $30; second class, $25; third class, $20; fourth class, $15; fifth class, $6; sixth class, $3. Enlisted men of the Army and the Marine Corps shall receive, as a permanent addition to their pay, an increase of 10 per centum of their base pay and pay for specialists' ratings upon completion of the first four years of service, and an additional increase of 5 per centum of such base pay and pay for specialists' ratings for each four years of service thereafter, but the total of such increases shall not exceed 25 per centum. Enlisted men of the Navy shall be entitled to receive at least the same pay and allowances as are provided for enlisted men in similar grades in the Army and Marine Corps." *The Selective Training and Service Act of 1940 as amended*, ch. 720, §12(a), P.L. 76-783, 54 Stat. 885.

No distinction was made as between volunteer or inductee. The members of the organized Philippine military were inducted into the United States Armed Forces. This pay statute should have applied to them. Yet, it never was, and they received instead up to 50% less pay.

We submit that the applicability of the primary basic pay statute should have been upheld in the proceedings below. At the very least, the issue should have been addressed as it is determinative of the military backpay claim of petitioners. It is precisely because of their exclusion from the express terms of the statute that their backpay claim arises.

II.

DOES THE GOVERNMENT'S PUBLIC POSITION THAT THIS PRIMARY BASIC PAY STATUTE NEVER APPLIED TO THE FILIPINO MEMBER OF THE UNITED STATES ARMED FORCES TOLL THE APPLICABLE STATUTE OF LIMITATIONS?

The government never applied the statute to the Filipino member of the United States Armed Forces. In fact, to boost the morale of the Filipino soldiers in the battlefield, they were constantly informed of various government efforts to raise their pay to a level equal to that of their American counterparts. Therein lies the crux of the matter. No such attempts were necessary. Neither remedial legislation nor executive action was needed to equalize the pay of the Filipino solider to that of his American counterpart. The aforementioned primary basic pay statute already applied to all members of the United States Armed Forces, including the Filipino. Even today this government position is still being perpetuated.

The government has invoked the applicable statute of limitations, to wit:

> "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.
>
> Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years of termination of the river and harbor improvements operations on which the claim is based.
>
> A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

> A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account." 28 U.S.C. §2501.

The government alleges that the claim for military backpay accrued more than half a century ago upon separation of petitioners from service right after the war. The six-year period so prescribed would therefore bar the claim. However, if this military pay statute is found to be indeed applicable to the Filipino soldier, then that fact was consciously and deliberately concealed by the government. In like circumstances, where there is fraudulent or deliberate concealment of facts that could be the basis of a claim or cause of action, courts have consistently held that the applicable statute of limitations should be tolled, *Holmberg v. Albrecht*, 327 U.S. 397 (1946); *Goewy v. U.S.*, 222 Ct. Cl. 104 (1979); *Barret v. U.S.*, 689 F.2d 324 (2d Cir. 1982); *Welcker v. U.S.*, 752 F.2d 1577 (Fed. Cir. 1985). This is so because the claim is held not to accrue until the injured party learns of the existence of underlying facts for it.

We submit that the government's continued disavowal of the applicability of the primary basic pay statute to the Filipino member of the United States Armed Forces is so intentionally misleading that it warrants the tolling of the applicable statute of limitations. At the very least, it has been held that where the government is accused of fraud or deliberate concealment and it poses the defense of limitations, resolution of a motion to dismiss based thereon must await a determination of whether or not there were such acts, *Mulholland v. U.S.*, 165 Ct. Cl. 231 (1964).

III.
IS THE "CONTINUING CLAIMS" DOCTRINE APPLICABLE?

The government also alleged that any claim based on the disqualification of Filipino members of the United States Armed Forces from a vast array of comprehensive benefits made available to veterans could only have accrued with the passage in 1964 of legislation that resulted in their ineligibility, which states:

> "Service before July 1, 1946, in the organized military forces of the Government of the Commonwealth of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerilla forces under commanders appointed, designated, or subsequently recognized by the Commander in Chief, Southwest Pacific Area, or other competent authority in the Army of the United States, shall not be deemed to have been active military, naval or air service for the purpose of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the Armed Forces, except benefits under—
>
> (1) contracts of National Serivce Life Insurance entered into before February 18, 1946;
>
> (2) chapter 10 of Title 37; and
>
> (3) chapters 11, 13 (except section 1312(a), and 23 of this title.
>
> Payments under such chapters shall be made at a rate in pesos as is equivalent to $0.50 for each dollar authorized, and where annual income is a factor in entitlement to benefits, the dollar limitations in the law specifying such annual income shall apply at a rate in Philippine pesos equivalent to $0.50 for each dollar. Any payments made before February 18,

> 1946, to any such member under such laws conferring rights, benefits or privileges shall not be deemed to have been invalid by reason of the circumstance that such member's services was not service in the Armed Forces, or any component thereof within the meaning of such law." 38 U.S.C. §107(a).

A claim based thereon should have been filed within six years of enactment, otherwise this statute of limitations would bar any suit beyone that prescribed perio!.

One of the benefits taken away from the Filipino soldier of the United States Armed Forces is entitlement to pension payments, 38 U.S.C. §1521 and §1541. *See* Appendix to petition.

Thus, veterans of the United States Armed Forces have a legitimate entitlement from the government to periodic payments in the form of non-service connected pension benefits for themselves and their dependents or survivors. This entitlement is protectible property interest. The Filipino veteran was deprived of this private property by a law the validity of which has been upheld.

In the case of periodic payments, courts have recognized the "continuing claims" doctrine. The doctrine states that only those claims based on payments due more than six years prior to the filing of suit are barred by the applicable statute of limitations, but those within the six-year period are not—even though the grounds for refusal to pay was enacted more than six years ago, *Friedman v. U.S.*, 159 Ct. Cl. 1 (1963). Each successive failure to pay gives rise to a new cause of action. Consequently, actions based on payments falling due within 6 years from the filing of suit for non-service connected pension benefits that petitioners would have been entitled to had they not been disqualified are not time-barred.

They are therefor entitled to the payment of just compensation for those periodic payments that were due six years prior to the filing of the suit and to which they were deprived as mandated by the Takings clause of the 5th amendment to the United States Constitution, which states that:

> "No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment of an indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, where in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." U.S.C.A., Const. Amen. 5.

We submit that the "continuing claims" doctrine applies to the non service-connected pension benefits of the Filipino veteran, entitling them to just compensation for those payments denied them by law within the six-year period prior to the filing of this suit.

CONCLUSION

It is unconscionable that the Filipino member of the United States Armed Forces, who was an American national at the time of his induction therein, continues to be denied treatment equal to all other members of the American military in the Second World War. It is an injustice that persons who had no legal obligation to render compulsory military service were conscripted

anyway. That is tantamount to slavery. Consider the conscription statute at that time, to wit:

> "Except as otherwise provided by in this Act, every male citizen of the United States and every male alien residing in the United States, who has declared his intention to become such a citizen, between the ages of twenty-one and thirty-six at the time fixed for his registration, shall be liable for training and service in the land or naval forces of the United States. The President is authorized from time to time, whether or not a state of war exists, to select and induct into the land or naval forces for training and service, in the manner provided by this Act, such number of men as in his judgement is required for such forces in the national interest: *Provided*, That within the limits of the quota determined under section 4(b) for the subdivision in which he resides, any person, regardless of race or color, between the ages of eighteen and thirty-six, shall be afforded an opportunity to volunteer for induction into the land or naval forces of the United States for the training and service prescribed in subsection (b), but no person who so volunteers shall be inducted for such and service as long as he is deferred after classification: *Provided further*, That no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: *Provided further*, That no men shall be inducted for such training and service until adequate provision shall have been made for such shelter, sanitary facilities, water supplies, heating and lighting arrangements, medical care, and hospital accomodations, for such men, as may be determined by the Secretary of War or the Secretary of the Navy, as the case

> may be, to be essential to public and personal health; *Provided further*, That except in time of war there shall not be in active training or service in the land forces of the United States, at any one time under subsection (b) more than nine hundred thousand men inducted under the provisions of this Act. The men inducted into the land or naval forces for training and service under this Act shall be assigned to camps or units of such forces." *Selective Training and Service Act,* ch. 720, 3(a), P.L. 76-783, 54 Stat. 885.

Filipinos were never citizens of the United States. In fact, although American nationals then, they were considered "aliens" for immigration purposes. It is also well-settled that the Philippines was never part of the United States. And while the military pay provisions of the Selective Training and Service Act of 1940 as amended did not limit its applicability to certain classes of members of the armed forces, its provisions on conscription could only require compulsory military service of American citizens and certain male residents of the United States. History has shown us that the Filipino served in the American military with valor, courage and gallantry. Yet, for more than half a century, the Filipino World War II veteran who served in the American Military in World War II without reservation continues to come before Congress with hat in hand begging for treatment equal to all other soldiers who served in the United States Armed Forces–including some 116,000 soldiers from 66 different nationalities. Whether such discriminatory treatment is sanctioned by the Constitution is a federal question that should be resolved by this Honorable Court for uniformity and consistency. It is an injustice that their past military service is considered active service in the

United States Armed Forces for the purpose of some veterans' benefits provided by the government such as service-connected disabilities and naturalization privileges, but otherwise not qualifying for the majority of veterans' benefits. They are either veterans of the United States Armed Forces or they are not.

The constitutionality of the disqualification imposed by 38 U.S.C. 107(a), *infra*, has been challenged in court on due process and equal protection grounds, but it was held that the discrimination was not subject to strict scrutiny as the Filipino members of the United States Armed Forces do not constitute a suspect class. See *FAVADA v. U.S.*, 391 F. Supp. 1314 (N.D. CA 1974) and *Quiban v. Veterans Administration*, 928 F.2d 1154 (D.C. Cir. 1991). It was further held that since the rational basis test was met with economic considerations, the discrimination did not violate the due process and equal protection guarantees of the United States Constitution. This Court has yet to consider the question as to whether or not the Filipino members of the United States Armed Forces and their dependents/survivors constitute a suspect class for whom any discriminatory act of government should require strict scrutiny and compelling interests for justification. Distance and poverty has kept them from coming to this Court for more than half a century. At the very least, they deserve to be heard. The issue is an important federal question, involving fundamental constitutional guarantees affecting hundreds of thousands of individuals.

We submit that the Court should exercise its supervisory powers so that this important question of federal law is settled finally.

The Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

EMETERIO G. ROA, III
201 South Irving Street
Arlington, Virginia 22204
(703) 486-3541
Counsel for Petitioners.

April 14, 1999

APPENDIX A

[NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

98-5081

REV. FR. PRISCO ENTINES,
ELEAZAR P. ANDOQUE and
OLYMPIA A. SAARENAS,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: January 14, 1999

Before NEWMAN, LOURIE, and SCHALL, *Circuit Judges.*

NEWMAN, *Circuit Judge.*

Rev. Fr. Prisco Entines and the other plaintiffs are Filipino veterans who fought under United States command in World War II, or their survivors. They appeal the

decision of the United States Court of Federal Claims,[1] which held that the plaintiffs' claims were barred by the applicable six-year statute of limitations.

Although it was known during and after World War II that the rates of pay were unequal, proposed executive or legislative remedies never came to pass. This suit was filed on November 22, 1996, on various legal theories including entitlement to back pay, takings and just compensation, and breach of express or implied contracts. The continuing claims doctrine was raised, including issues of the continuing effect of the pay disparity on veterans' benefits.

On granting the government's motion for dismissal on limitations grounds, the Court of Federal Claims held that the claims accrued more than six years before this suit was filed, that there was no basis for tolling the statute of limitations, and that the continuing claims doctrine does not apply. We have carefully considered the issues and arguments, and conclude that the Court of Federal Claims correctly decided the case. That decision is *affirmed*, for the reasons explained by the Court of Federal Claims.

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[1] *Entines v. United States*, 39 Fed. Cl. 673 (1997).

APPENDIX B

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 96-740C
(Filed: December 16, 1997)

Statute of limitations; accrual of claim;
tolling of statute of limitations;
continuing claims doctrine.

REV. FR. PRISCO E. ENTINES,
ELEAZAR P. ANDOQUE, and
OLYMPIA A. SAARENAS,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Emeterio G. Roa III, Ordoveza Law Offices, Arlington, Virginia, for plaintiffs.

John K. Lapiana, Civil Division, United States Department of Justice, Washington, D.C., for defendant, with whom on the brief were *Frank W. Hunger,* Assistant Attorney General, and *David M. Cohen,* Director.

OPINION

MARGOLIS, Judge.

Plaintiffs, Filipino veterans who fought under United States command during World War II or their surivors,

have sued the United States for back pay, just compensation under the Fifth Amendment, and breach of express or implied-in-fact contracts. The case is currently before the Court on the government's motion to dismiss plaintiffs' complaint pursuant to Rule of the Court of Federal Claims ("RCFC") 12(b)(1). The government argues that the applicable statute of limitations bars plaintiffs' claims. Plaintiffs respond that the Court should toll the limitations period such that their claims would be timely. In the alternative, plaintiffs argue that the continuing claims doctrine is applicable, which, if true, would rescue some of their claims from the government's motion. The Court concludes that each of plaintiffs' claims accrued more than six years before they filed this suit, that plaintiffs have not established that tolling the statute of limitations is appropriate, and that the continuing claims doctrine is not applicable to the facts at issue. Plaintiffs' claims, therefore, are barred by the applicable six-year statute of limitations. Accordingly, the government's motion to dismiss is granted.

FACTS

At the conclusion of the Spanish-American War in 1898, Spain ceded the Philippine Islands to the United States. *See* Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754, 1759. On March 24, 1934, Congress passed the Philippine Independence Act, which provided that the Philippines would become a self-governing nation of July 4, 1946. *See* Pub. L. No. 73-127, §10(a), 48 Stat. 456, 463 (1934). In 1935, as permitted by the Act, the Philippines adopted a constitution, organized a new government, and created the Philippine Army. Section 2(a)-(2) of the Independence Act, however, contained a provision that permitted the president of the United States "to

call into the service of [United States] armed forces all military forces organized by the Philippine government." Philippine Independence Act of 1934, §2(a)(12).

Prior to American entry into World War II, then President Franklin D. Roosevelt exercised his authority under section 2(a)(12) of the Act. In July 1941, the President issued the following military order:

> I hereby call and order into the service of the armed forces of the United States for the period of the existing emergency, and place under the command of a General Officer, United States Army, . . . all of the organized military forces of the Government of the Commonwealth of the Philippines . . . .

3 C.F.R. 1307 (1941). After the Japanese attack on Pearl Harbor, General Douglas MacArthur, commander of the United States Armed Forces in the Far East, was given authority over Philippine soldiers then under United States command. *See Quiban v. Veterans Admin.*, 928 F.2d 1154, 1157 (D.C. Cir. 1991).

Although Philippine and American soldiers fought alongside one another during the Japanese invasion of the Philippines, and although the United States paid the wages of both, their rate of pay was never the same. *See Filipino Am. Veterans & Dependents Ass'n v. United States*, 391 F.Supp. 1314, 1317 (N.D. Cal. 1974). Apparently, General MacArthur and other members of the War Department initially supported pay equalization. *See Ouiban*, 928 F.2d at 1157. The first of two significant attempts to effect such occurred in 1942. Legislation equalizating the pay of American and Philippine soldiers, supported by the War Department, passed the Senate and was reported upon favorably by a House committee. *See* S. 2387, 77th Cong. (1942); H.R. Rep. No. 77-2078 (1942). This legislation, however, never became law.

According to plaintiffs, after the fall of Bataan and Corregidor, and the corresponding "decimation" of the Philippine Army, the United States decided that pay equalization was no longer useful. The legislation was allowed to die in Congress. The second attempt occurred shortly after American reentry into the Philippines in October 1944, when the President of the Philippines issued an executive order raising the pay scale of soldiers in the Philippine Army to levels then prevailing for United States military personnel. *See Quiban*, 928 F.2d at 1157. The United States never implemented this change. *See id.*

In 1946, the First Supplemental Surplus Appropriation Rescission Act became law. *See* Pub. L. No. 79-301, 60 Stat. 6 (1946). This Act restricted the availability of certain veteran benefits to Philippine soldiers who fought under United States command in World War II. As currently codified, the Act provides:

> Service before July 1, 1946, in the organized forces of the Government of the Philippines, while such forces were in the service of the Armed Forces of the United States pursuant to the military order of the President dated July 26, 1941, including among such military forces organized guerrilla forces under commanders appointed, designated, or subsequently recognized by . . . competent authority in the Army of the United States, shall not be deemed to have been active military, naval, or air service for the purposes of any law of the United States conferring rights, privileges, or benefits upon any person by reason of the service of such person or the service of any other person in the Armed Forces,

except with respect to certain benefits not at issue in this

case.[1] 38 U.S.C. §107(a). The effect §107(a) was to deny veteran benefits to those who served under United States command while in the Philippine military, because eligibility for veteran benefits is dependent upon "veteran" status, and veteran status requires service "in the active military, naval, or air service." 38 U.S.C. §101(2); *see Quiban*, 928 F.2d at 1158 n.7. In addition, §107(a) reduced by fifty percent those service-related benefits that Filipino veterans could receive. *See* 38 U.S.C. §107(a).

Plaintiffs here are Filipino World War II veterans or their survivors. Eleazar P. Andoque served initially with the Philippine Army and later with recognized guerilla forces. Rev. Fr. Prisco E. Entines is the son of Enrique Hapa Entines, who died while serving with the Philippine Army guerrilla forces. Olympia A. Saarenas is the widow of Renato F. Saarenas, who also served with the Philippine Army guerrilla forces. Plaintiffs' suit, filed on November 22, 1996, is grounded in three theories: (1) claims for back pay based upon the difference between wages paid to American soldiers and those paid to Filipino soldiers during World War II; (2) takings claims based upon 38 U.S.C. §107(a) and its effective denial of veteran benefits to former members of the Philippine Army; and (3) claims for breach of express or implied-in-fact contracts for military services between the United States and members of the Philippine Army during World War II. Plaintiffs would like to represent all persons similarly situated, and accordingly have moved the Court to

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[1] The excepted service-related benefits include: (1) National Life Insurance benefits under pre-1946 contracts; (2) benefits paid to prisoners of war or persons missing in action; and (3) non-Social Security Act death or disability and burial benefits. *See* 38 U.S.C. §107(a).

certify a class. Consideration of that motion has been stayed pending resolution of the issues raised in the instant motion.

DISCUSSION

The case is currently before the Court on the government's motion to dismiss plaintiffs' complaint pursuant to RCFC 12(b)(1). The government argues that plaintiffs' claims are untimely because their complaint was filed decades after the claims accrued. Plaintiffs respond that the facts here warrant tolling the statute of limitations such that all claims would be timely. In the alternative, plaintiffs argue that the continuing claims doctrine is applicable, which, if true, would rescue some claims from the government's motion. The Court concludes that each of plaintiffs' claims accrued more than six years before they filed this suit, that plaintiffs have not established that tolling the statute of limitations is appropriate, and that the continuing claims doctrine is not applicable to the facts at issue. Plaintiffs' claims, therefore, are barred by the applicable six-year statute of limitations. Accordingly, the government's motion to dismiss is granted.

I. The Statute of Limitations

Plaintiffs allege that the Court has jurisdiction over the instant suit pursuant to the Tucker Act, 28 U.S.C. §1491 (a)(1). The statute of limitations for suits brought under the Tucker Act is found in 28 U.S.C. §2501: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The case law provides, and the parties agree, that §2501 is applicable to plaintiffs' back pay claims, *see Sanders v.*

United States, 34 Fed. Cl. 75, 80 (1996) (applying §2501 to a military back pay claim), *aff'd*, 104 F.3d 376 (Fed. Cir. 1996), takings claims, *see Catellus Dev. Corp. v. United States*, 31 Fed. Cl. 399, 404 (1994) (applying §2501 to a takings claim), and implied-in-fact contract claims, *see Truckee-Carson Irrigation Dist. v. United States*, 14 Cl. Ct. 361, 374 (applying §2501 to claim for breach of implied-in-fact contract), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988).

The Tucker Act's statute of limitations is a jurisdictional requirement, and as an express condition on the government's waiver of sovereign immunity, must be strictly construed. *See Hart v. United States*, 910 F.2d 815, 818-19 (Fed. Cir. 1990); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). Plaintiff bears the burden of establishing all jurisdictional requirements, including compliance with the six-year statute of limitations, and must do so by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (interpreting the Federal Rules' counterpart to RCFC 12(b)(1)); *Catellus Dev. Corp.*, 31 Fed. Cl. at 404-05; *Mason v. United States*, 27 Fed. Cl. 832, 836 (1993). A litigant's failure to comply with the statute of limitations will "place[] the claim beyond the court's power to hear and decide." *Catellus Dev. Corp.*, 31 Fed. Cl. at 404 (citing *Soriano v. United States*, 352 U.S. 270, 273 (1957)).

Defendant has moved, pursuant to RCFC 12(b)(1), to dismiss plaintiffs' complaint as untimely. When considering such a motion, the Court initially accepts as true all undisputed factual allegations found in the complaint, and construes all facts in the light most favorable to the plaintiff. *See Reynolds*, 846 F.2d at 747 (interpreting the

Federal Rules' counterpart to RCFC 12(b)(1)); *McDonald v. United States*, 37 Fed. Cl. 110, 113 (1997); *Catellus Dev. Corp.*, 31 Fed. Cl. at 405. The Court may, however, look to other relevant evidence if the motion to dismiss challenges the truth of the complaint's jurisdictional facts. *See Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *Farmers Grain Co. v. United States*, 29 Fed. Cl. 684, 686 (1993). Plaintiffs filed their complaint on November 22, 1996. Defendant's motion, therefore, must be granted unless plaintiffs can establish by a preponderance of the evidence that their claims first accrued on or after November 22, 1990, or that some time-bar saving doctrine is applicable.

II. Accrual of a Claim

Generally, "[a]claim accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.' " *Brighton Village Assocs. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (quoting *Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988)). Claims for military back pay accrue upon discharge or separation from active duty status. *See Sanders*, 34 Fed. Cl. at 80. a takings claim under the Fifth Amendment accrues on the date that the United States takes a private property interest for a public use without just compensation. *See Alliance of Descendants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). When the government action at issue occurs pursuant to legislation, a resulting takings claim accrues on the date the legislative act took effect. *See Fallini v. United States*, 56 F.3d 1378, 1382-83 (1995), *cert. denied*, 116 S.Ct. 2496 (1996); *Alliance of Descendants*, 37 F.3d at 1482. A breach of contract claim accrues when the breach occurs. *See Brighton Village Assocs.*, 52 F.3d at 1060.

In order to determine when plaintiffs' claims for back pay accrued, the Court must determine when each plaintiff was discharged or otherwise separated from active duty status. *See Sanders*, 34 Fed. Cl. at 80. The only evidence before the Court in this regard is the Administrative Record filed by the government.[2] The Court finds, based on the evidence currently before it, that Eleazar Andoque was discharged in August 1945, and that Renato Saarenas was discharged in September 1945. Plaintiffs did not dispute these findings in their briefs or during oral argument. Accordingly, plaintiffs' back pay claims all accrued during 1945, more than six years before they filed their complaint. As such, these claims are barred by the statute of limitations.

When the government takes private property pursuant to legislative directive, any resulting takings claims accrue when the legislation becomes effective. *See Fallini*, 56 F.3d at 1382-83. Assuming, *arguendo*, that plaintiffs did in fact have a private property interest in veteran benefits, and that such property was "taken" by the enactment of 38 U.S.C. §107(a), *Fallini* teaches that all takings claims based thereon accrued in 1946 when §107(a) became law. Again, plaintiffs filed their complaint decades after these claims accrued, many years after the statute of limitations expired. Plaintiffs' takings claims, therefore, also are untimely.

Finally, a breach of contract claim accrues when the breach occurs. *See Brighton Village Assocs.*, 52 F.3d at 1060. The alleged contracts here called for the provision of military services by plaintiffs in exchange for the

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[2]Plaintiffs did not oppose the government's motion for leave to file the Administrative Record, and have not disputed the government's averments as to when the servicemen at issue were discharged or became separated from active duty status.

government's payment of the same wages and benefits enjoyed by American soldiers. For purposes of this motion only, the Court assumes the existence of these contracts. With respect to any wage deficiencies, the government's breach could not have occurred later than discharge or other separation from service, as such events would signify the conclusion of the government's obligation to pay wages. Furthermore, passage of 38 U.S.C. §107(a), legislation that prevented the government from providing veteran benefits to Filipino soldiers, could be sufficient to constitute a breach of the alleged contractual obligation to provide such benefits. Hence, plaintiffs' breach of contract claims all accrued more than six years before they filed their complaint. Such claims, therefore, are barred by the statute of limitations.

Plaintiffs do not dispute that each of their claims first accrued long before they instituted this action. Instead, they argue that the facts of this case warrant tolling the six-year statute of limitations.

III. Tolling the Statute of Limitations

In limited circumstances, the running of the statute of limitations may be tolled. A plaintiff, in order to avail himself of this benefit, "must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Japanese War Notes Claimants Ass'n v. United States*, 178 Ct. Cl. 630, 634 (1967); *see Mitchell v. United States*, 13 Cl. Ct. 474, 477 (1987) (stating that tolling is appropriate "only where the facts underlying a wrong have been deliberately concealed or where the facts are inherently unknowable at the time the injury first occurs" (citations omitted)). The statute will remain tolled until

a plaintiff discovers, or reasonably should have discovered, that he might have a claim. *See Japanese War Notes Claimants Ass'n*, 178 Ct. Cl. at 634. This is an objective standard, and a plaintiff's ignorance of his claim is not, without more, sufficient to justify tolling the statute. *See Jakoby v. United States*, 38 Fed. Cl. 192, 195 (1997). Furthermore, " '[w]here the actions of the government are open and notorious, we have pointed out that plaintiff is on inquiry as to its possible injury. Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run.' " *Id.* (quoting *Catellus Dev. Corp.*, 31 Fed. Cl. at 405). Finally, because tolling is a judicially created exception to the statute of limitations, the plaintiff bears the burden of clearly demonstrating that either the "government concealment" or "inherently unknowable" exception is applicable. *See Catellus Dev. Corp.*, 31 Fed. Cl. at 407-08.

Plaintiffs argue that tolling their back pay claims is appropriate because the government intentionally chose not to inform them that the military's primary basic pay statute, the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885, was applicable to Filipino soldiers, and because there was a "conscious and deliberate" decision by the government to conceal its abandonment of a legislative solution to the wage disparity. With respect to their breach of contract claims, plaintiffs contend that they were "completely unaware" of terms in their contracts that entitled them to the same compensation American soldiers received, and so could not possibly have been aware of the government's breach thereof. As to their takings claims, plaintiffs note that the government recently processed a claim by one of them for *disability* benefits, and that the government did not protest the timeliness of that claim. This same delay, they argue,

should not now defeat plaintiffs' takings claim. Furthermore, plaintiffs argue that although the constitutionality of §107(a) has been challenged in the past, such challenges were never brought under the Takings Clause. The absence of takings litigation, plaintiffs assert, demonstrates the unknowability of such claims.

Additionally, plaintiffs maintain that conditions on the Philippine Islands during and immediately after World War II rendered all of their claims unknowable. Filipinos in this era faced invasion and occupation of their homeland, guerrilla warfare against the invaders, and, after the defeat of the Japanese, a period of intense rebuilding. All this took place while the nation was taking its first tentative steps toward political independence. Claims for for back pay, breach of contract, and just compensation were simply too far removed to be considered by soldiers. Compounding the situation was the fact that the claims had to be asserted in a foreign legal system, in a nation located on the other side of the world. According to plaintiffs, it was simply unimaginable to the average Filipino soldier that he had a claim against the United States.

It is important to remember that tolling is not appropriate for claims that are simply burdensome or inconvenient to discover. Instead, a claim must be "inherently unknowable" before it is proper to toll the statute of limitations. Cases have elaborated on the distinction: "When a claim is inherently unknowlable it does not mean that the claim is 'somewhat difficult to discover,' or is 'not entirely obvious.' That which is inherently unknowable is that which is unknowable by its very essence, i.e., its existence at the critical moment simply cannot be ascertained." *Catellus Dev. Corp.*, 31 Fed. Cl. at 407. This court's predecessor, the Court of Claims,

offered the poignant example of a defendant who delivers the wrong type of fruit tree to an unsuspecting plaintiff. In such a case, the statute of limitations for plaintiff's claim will be tolled until the tree bears fruit, that is, until plaintiff is capable of discovering his injury. *See Japanese War Notes Claimants*, 178 Ct. Cl. at 634.

The Court need look only to plaintiffs' briefs to conclude that tolling the statute of limitations is not appropriate here. To avoid dismissal, plaintiffs must demonstrate that the facts underlying their claims were inherently unknowable, or that the government deliberately concealed such facts, not simply at the time the claims accrued, but for the entire period beginning at accrual and extending until six years before plaintiffs filed their complaint. *See Mitchell*, 13 Cl. Ct. at 477. This they cannot do. Plaintiffs state in their complaint that "the disparity in pay between these Filipino soldiers and the rest of the members of the United States Armed Forces . . . did not go unnoticed" by Filipino soldiers and that "[t]he introduction of the [wage equalization] was given much publicity" in the Philippines. (Compl. ¶ 33.) With regard to §107(a), plaintiffs note that several bills have been introduced in Congress that attempted to restore the benefits taken by §107(a), and cite cases initially decided in 1974 and 1989 that considered constitutional challenges to §107(a). *See Quiban*, 928 F.2d at 1155-56; *Filipino Am. Veterans & Descendents Ass'n*, 391 F. Supp. at 1315-16. It is difficult to square these admissions about the public nature of the facts underlying plaintiffs' claims with the requirements for tolling the statute of limitations. Even if plaintiffs were unaware of these facts, they were matters of public record, and certainly were not "inherently unknowable" as the courts have defined that term. Ignorance of a

claim, alone, is not sufficient to toll the statute of limitations. *See Jakoby*, 38 Fed. Cl. at 195.

Furthermore, plaintiffs have presented no evidence that the government effectively concealed the facts underlying their claims. The only related evidence plaintiffs offered was declassified government documents that indicate that the United States made a conscious decision to allow wage equalization legislation to die in Congress, rather than officially withdraw it, so as to minimize any adverse impact on America's image in the Philippines. This evidence does not, however, provide any support to plaintiffs' assertion that the government concealed the fact that it paid American soldiers more than it paid Filipino soldiers, or that the Act containing §107(a) had been passed into law. The public nature of these government actions was sufficient to put plaintiffs on inquiry as to their possible injury, which in turn permitted the statute of limitations to run. *See Coastal Petroleum Co. v. United States*, 228 Ct. Cl. 864, 866 (1981).

Even assuming, *arguendo,* that the facts underlying plaintiffs' claims were "inherently unknowable" when they initially accrued, or that the government concealed these facts from plaintiffs, the Court concludes that plaintiffs knew, or should have known, of their claims prior to November 1990, six years before they filed their complaint. The fact that other Filipino World War II veterans challenged §107(a) in the 1970s and 1980s, regardless of the theory of those claims, fatally undermines plaintiffs' contention that the facts underlying their takings claims were inherently unknowable or effectively concealed by the government until November 1990. *See Quiban*, 928 F.2d at 1155-56; *Filipino Am. Veterans & Dependents Ass'n*, 391 F. Supp. at 1315-16. The plaintiffs in these earlier cases were sufficiently aware of §107(a) and its

impact on their rights to veteran benefits to bring suit against the United States. Their claims, and the facts upon which they were based, therefore, were neither inherently unknowable nor effectively concealed by the government. Due to the fact that the requirements for tolling the statute of limitations are objective, plaintiffs' takings claims in the present suit were also knowable when §107(a) was first challenged, long before November 1990.[3] The Court also notes that the wage disparity at issue in the present case was discussed in both of these earlier cases. *See Quiban*, 928 F.2d at 1157; *Filipino Am. Veterans & Dependents Ass'n*, 391 F. Supp. at 1317. This fact necessitates the conclusion that back pay and breach of contract claims were knowable by those plaintiffs, and hence knowable by plaintiffs here, when these earlier cases were litigated.

Plaintiffs also argue that because the government recently processed one of their disability claims without protesting its timeliness, their takings claims should be permitted to proceed. The critical flaw in this analysis is that it fails to recognize that §107(a) does not apply to disability claims, and that Filipino veterans are entitled to disability benefits. *See* 38 U.S.C. §107(a); *supra* note 1. The government, therefore, was obligated to process this claim as it would for any United States veteran, and doing so has no impact on the takings claims plaintiffs raise in the instant suit.

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[3] Plaintiffs argue that the absence of takings litigation based upon §107(a) supports the conclusion that such claims were inherently unknowable. A total absence of suits based upon §107(a) would be, at best, consistent with the conclusion that such claims were unknowable. However, the existence of any challenges to §107(a), even nontakings challenges, negates the argument that their takings claims were unknowable.

Finally, the Court recognizes that instituting suit against the United States for back pay, breach of contract, and just compensation may have been difficult for veterans living in the Philippines immediately following World War II. Even if the Court concluded that the situation in the Philippines initially rendered plaintiffs' claims unknowable, which the Court expressly declines to do, conditions in the 1940s and 1950s do not explain why plaintiffs have waited until the 1990s to bring suit.

Tolling the statute of limitations is, in effect, an expansion of the government's waiver of sovereign immunity. This Court, therefore, is permitted to do so only after a plaintiff has clearly established that the requirements for tolling have been satisfied. *See Catellus Dev. Corp.*, 31 Fed. Cl. at 407-08. Because plaintiffs here have not done so, the Court may not toll the statute of limitations in this case.

IV. The Continuing Claims Doctrine

Plaintiffs contend that the continuing claims doctrine is applicable to their takings claims. If this is true, the statute of limitations would not bar suit for benefits that would have been paid during the six years prior to institution of this action. The government dismisses the doctrine, relying primarily on recent authority in the Federal Circuit and Court of Federal Claims that appears to question the continuing vitality of the doctrine.

Under the continuing claims doctrine, "periodic pay claims accruing within the six years prior to suit are not barred, although the administrative failure or refusal to pay the amount claimed and the enactment of the statute giving rise to the claim were prior to the six-year span. Where payments are to be made periodically, . . . each failure to make a proper payment gives rise to a new

cause of action." *Russell v. United States*, 161 Ct. Cl. 183, 186 (1963). In other words, the continuing claims doctrine typically applies where a law or regulation instructs the government to make periodic payments to someone, but the government fails to do so. *See Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1457 (1997). Each failure to make a required payment gives rise to an independent cause of action, one with its own limitations period. The effect of the doctrine is that claims based on missed payments during the six years prior to the filing of the complaint will always be timely.

Plaintiffs takings claims are not "continuing claims," and so that doctrine is not applicable to this case. The continuing claims doctrine applies where a law or regulation instructs the government to make periodic payments to someone, but the government fails to do so. *See Brown Park Estates-Fairfield Dev. Co.*, 127 F.3d at 1457; *Friedman v. United States*, 159 Ct. Cl. 1, 6-7 (1963). Here, no such law or regulation exists; indeed, it is the absence of such a law that has prompted plaintiffs' claims. Their takings claims are based upon the passage of §107(a), not the government's failure to make periodic payments that were required by law. At the moment §107(a) became effective, Filipino veterans lost any rights they may have had to benefits covered by §107(a). Any takings claims that resulted from the passage of §107(a) accrued in their entirety when the legislation became effective, that is, when all events had occurred that fixed the government's liability and entitled plaintiffs to institute an action. *See Fallini*, 56 F.3d at 1382-83; *see also Brown Park Estates-Fairfield Dev. Co.*, 127 F.3d at 1456 (stating that the continuing claims doctrine applies only to claims that are "inherently susceptible to being broken down into a series of independent

and distinct events or wrongs" and that "a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim"). Such claims could not be based on the government's failure to provide plaintiffs with the benefits at issue, because §107(a) relieved the government of any obligation to do so. Plaintiffs' claims, properly characterized, are for just compensation for private property[4] allegedly taken *by the passage of §107(a)*, not by a failure to make payments required by law.[5]

CONCLUSION

For the foregoing reasons, the Court concludes that each of plaintiffs' claims accrued more than six years before they filed their complaint, that plaintiffs have not demonstrated that tolling the statute of limitations is appropriate, and that the continuing claims doctrine is not applicable to the claims at issue. Plaintiffs' claims, therefore, are barred by the six-year statute of limitations applicable to suits before this Court. Accordingly, defendant's motion to dismiss is granted. The Clerk will dismiss the complaint.

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[4] The "private property" that plaintiffs claim was taken is an entitlement to veteran benefits.

[5] Because the claims at issue are not continuing claims, the Court does not address the government's contention that the continuing claims doctrine is no longer viable in this court.

The Court notes that its decision to dismiss plaintiffs' claims does not prevent them, or other Filipino World War II veterans, from seeking relief in the legislative branch of government.

/s/ Lawrence S. Margolis
Lawrence S. Margolis
Judge, U.S. Court of Federal Claims

December 16, 1997

APPENDIX C

TITLE 38 UNITED STATES CODE §1521

§1521. Veterans of a period of war

(a) The Secretary shall pay to each veteran of a period of war who meets the service requirements of this section (as prescribed in subsection (j) of this section) and who is permanently and totally disabled from non-service-connected disability not the result of the veteran's willful misconduct, pension at the rate prescribed by this section, as increased from time to time under section 5312 of this title.

(b) If the veteran is unmarried (or married but not living with or reasonably contributing to the support of such veteran's spouse) and there is no child of the veteran in the custody of the veteran or to whose support the veteran is reasonably contributing, and unless the veteran is entitled to pension at the rate provided by subsection (d)(1) or (e) of this section, pension shall be paid to the veteran at the annual rate of $3,550, reduced by the amount of the veteran's annual income.

(c) If the veteran is married and living with or reasonably contributing to the support of such veteran's spouse, or if there is a child of the veteran in the custody of the veteran or to whose support the veteran is reasonably contributing, pension shall be paid to the veteran at the annual rate of $4,651, unless the veteran is entitled to pension at the rate provided by subsection (d)(2), (e), or (f) of this section. If the veteran has two or more such family members, such annual rate shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the vet-

eran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members.

(d)(1) If the veteran is in need of regular aid and attendance, the annual rate of pension payable to the veteran under subsection (b) of this section shall be $5,680, reduced by the amount of the veteran's annual income.

(2) If the veteran is in need of regular aid and attendance, the annual rate of pension payable to the veteran under subsection (c) of this section shall be $6,781. If such veteran has two or more family members, as described in subsection (c) of this section, the annual rate of pension shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the veteran's annual income and, subject to subsection (h)(1) of this section, the amount of annual income of such family members.

(e) If the veteran has a disability rated as permanent and total and (1) has additional disability or disabilities independently ratable at 60 per centum or more, or (2) by reason of a disability or disabilities, is permanently housebound but does not qualify for pension at the aid and attendance rate provided by subsection (d) of this section, the annual rate of pension payable to the veteran under subsection (b) of this section shall be $4,340 and the annual rate of pension payable to the veteran under subsection (c) of this section shall be $5,441. If such veteran has two or more family members, as described in subsection (c) of this section, the annual rate of pension shall be increased by $600 for each such family member in excess of one. The rate payable shall be reduced by the amount of the veteran's annual income

and, subject to subsection (h)(1) of this section, the annnual income of such family members.

(f)(1) If two veterans are married to one another and each meets the disability and service requirements prescribed in subsections (a) and (j), respectively, of this section, the annual rate of pension payable to such veterans shall be a combined annual rate of $4,651.

(2) If either such veteran is in need of regular aid and attendance, the annual rate provided by paragraph (1) of this subsection shall be $6,781. If both such veterans are in need of regular aid and attendance, such rate shall be $8,911.

(3) If either such veteran would be entitled (if not married to a veteran) to pension at the rate provided by subsection (c) of this section, the annual rate provided by paragraph (1) of this subsection shall be $5,441. If both such veterans would be entitled (if not married to one another) to such rate, such rate shall be $6,231.

(4) If one such veteran is in need of regular aid and attendance and the other would be entitled (if not married to a veteran) to the rate provided for under subsection (e) of this section, the annual rate provided by paragraph (1) of this subsection shall be $7,571.

(5) The annual rate provided by paragraph (1), (2), (3), or (4) of this subsection, as appropriate, shall (A) be increased by $600 for each child of such veterans (or of either such veteran) who is in the custody of either or both such veterans or to whose support either such veteran is, or both such veterans are, reasonably contributing, and (B) be reduced by the amount of the annual income of both such veterans and, subject to subsection (h)(1) of this section, the annual income of each such child.

(g) The annual rate of pension payable under subsection (b), (c), (d), (e), or (f) of this section to any veteran who is a veteran of a period of war shall be increased by $800 if veterans of such period of war were not provided educational benefits or home loan benefits similar to those provided to veterans of later periods of war under chapters 34 and 37, respectively, of this title or under prior corresponding provisions of law.

(h) For the purposes of this section:

(1) In determining the annual income of a veteran, if there is a child of the veteran who is in the custody of the veteran or to whose support the veteran is reasonably contributing, that portion of the annual income of the child that is reasonably available to or for the veteran shall be considered to be income of the veteran, unless in the judgment of the Secretary to do so would work a hardship on the veteran.

(2) A veteran shall be considered as living with a spouse, even though they reside apart, unless they are estranged.

(i) If the veteran is entitled under this section to pension on the basis of such veteran's own service and is also entitled to pension on the basis of any other person's service, the Secretary shall pay such veteran only the greater benefit.

(j) A veteran meets the service requirements of this section if such veteran served in the active military, naval, or air service—

(1) for ninety days or more during a period of war;

(2) during a period of war and was discharged or released from such service for a service-connected disability;

(3) for a period of ninety consecutive days or more and such period began or ended during a period of war; or

(4) for an aggregate of ninety days or more in two or more separate periods of service during more than one period of war.

APPENDIX D

TITLE 38 UNITED STATES CODE §1541

§1541. Surviving spouses of veterans of a period of war

(a) The Secretary shall pay to the surviving spouse of each veteran of a period of war who met the service requirements prescribed in section 1521(j) of this title, or who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability, pension at the rate prescribed by this section, as increased from time to time under section 5312 of this title.

(b) If no child of the veteran is in the custody of the surviving spouse, pension shall be paid to the surviving spouse at the annual rate of $2,379, reduced by the amount of the surviving spouse's annual income.

(c) If there is a child of the veteran in the custody of the surviving spouse, pension shall be paid to the surviving spouse at the annual rate of $3,116. If the surviving spouse has custody of two or more such children, the annual pension rate shall be increased by $600 for each such child in excess of one. In each case, the rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the annual income of each such child.

(d)(1) If a surviving spouse who is entitled to pension under subsection (b) of this section is in need of regular aid and attendance, the annual rate of pension payable to such surviving spouse shall be $3,806, reduced by the amount of the surviving spouse's annual income.

(2) If a surviving spouse who is entitled to pension under subsection (c) of this section is in need of regular

aid and attendance, the annual rate of pension payable to the surviving spouse shall be $4,543. If there are two or more children of the veteran in such surviving spouse's custody, the annual rate of pension shall be increased by $600 for each such child in excess of one. The rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the annual income of each such child.

(e)(1) If the surviving spouse is permanently housebound but does not qualify for pension at the aid and attendance rate provided by subsection (d) of this section, the annual rate of pension payable to such surviving spouse under subsection (b) of this section shall be $2,908 and the annual rate of pension payable to such surviving spouse under subsection (c) of this section shall be $3,645. If there are two or more children of the veteran in such surviving spouse's custody, the annual rate of pension shall be increased by $600 for each such child in excess of one. The rate payable shall be reduced by the amount of the surviving spouse's annual income and, subject to subsection (g) of this section, the income of any child of the veteran for whom the surviving spouse is receiving increased pension.

(2) For purposes of paragraph (1) of this subsection, the requirement of "permanently housebound" shall be met when the surviving spouse is substantially confined to such surviving spouse's house (ward or clinical areas, if institutionalized) or immediate premises by reason of a disability or disabilities reasonably certain to remain throughout such surviving spouse's lifetime.

(f) No pension shall be paid under this section to a surviving spouse of a veteran unless the spouse was married to the veteran—

(1) before (A) December 14, 1944, in the case of a surviving spouse of a Mexican border period or World War I veteran, (B) January 1, 1957, in the case of a surviving spouse of a World War II veteran, (C) February 1, 1965, in the case of a surviving spouse of a Korean conflict veteran, (D) May 8, 1985, in the case of a surviving spouse of a Vietnam era veteran, or (E) January 1, 2001, in the case of a surviving spouse of a veteran of the Persian Gulf War;

(2) for one year or more; or

(3) for any period of time if a child was born of the marriage, or was born to them before the marriage.

(g) In determining the annual income of a surviving spouse for the purposes of this section, if there is a child of the veteran in the custody of the surviving spouse, that portion of the annual income of the child that is reasonably available to or for the surviving spouse shall be considered to be income of the surviving spouse, unless in the judgment of the Secretary to do so would work a hardship on the surviving spouse.

(h) As used in this section and section 1542 of this title, the term "veteran" includes a person who has completed at least two years of honorable active military, naval, or air service, as certified by the Secretary concerned, but whose death in such service was not in line of duty.